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No. 01-

IN THE

Supreme Court of the United States

TOPEKA STATE HOSPITAL AND
THE STATE OF KANSAS,

Petitioners,

v.

CYNTHIA TURNBULL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Can an employer be subjected to liability under Title VII for failing to prevent a criminal assault by a non-employee upon proof of merely a lack of ordinary care, or should the higher burden of proof required under similar civil rights statutes apply?

2. Does Title VII provide a federal tort remedy for bodily injury suffered by a State employee during the course of employment in the absence of intentional discrimination?

3. If, in light of questions 1 and 2, liability may be imposed under Title VII premised upon mere negligence does such liability, when applied to States, impermissibly infringe upon the sovereignty of the several States as preserved by the Tenth and Eleventh Amendments to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

The State of Kansas and the Topeka State Hospital respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. *infra* 1a-11a) is reported at 255 F.3d 1238. The judgment of the district court, announced in open court after finding the jury had deadlocked (App. *infra* 14a), is not reported nor was an opinion filed.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2001. (App., *infra*, 1a.) The petition for rehearing was denied on August 10, 2001. (App., *infra*, 12a.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

As the constitutionality of Title VII, as applied by the court below, may be called into question herein, Petitioner has served, contemporaneously with the filing of this petition, a copy of this petition upon Solicitor General of the United States pursuant to 28 U. S. C. § 2403(a). The court below did not address the constitutionality of its construction of Title VII and, thus, that court has not certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 703(a) of Title VII provides, in relevant part:

> it shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's ... sex.

42 U.S.C. § 2000e-2(a)(1).

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Fourteenth Amendment provides, in relevant part:

> Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ....
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

STATEMENT

This case confronts the Court with the need to determine the scope of Title VII as applied to bodily injury cases

involving merely negligent conduct by an employer in failing to anticipate and prevent a criminal assault upon an employee by a non-employee.

Topeka State Hospital (TSH) was a state-run inpatient mental health center which treated patients with severe mental illnesses for whom outpatient treatment options had failed. The hospital closed in 1997. All patients admitted to TSH posed some danger to themselves or others. TSH was not a jail and patients were treated in the least restrictive environment possible. THS was obliged to admit any patient referred to the hospital, but violent offenders could unusually be transferred to more secure facilities.

Cynthia Turnbull, Ph.D., a psychologist, became employed at TSH in 1993. Dr. Turnbull was hired to start a group therapy program for the adolescent treatment unit and to conduct individual and group therapy with adolescent male inpatients. One treatment issue that arose regularly was the "sexual acting out" displayed by many of the patients. TSH staff were aware this "acting out" posed potential dangers, as was demonstrated when a female employee was murdered by a patient in 1992. The hospital purchased personal alarms known as "screechers" after the 1992 murder, but they had fallen out of use by the time Dr. Turnbull started work and she did not know of their availability. Dr. Turnbull nonetheless recognized the risks of her job, and she regularly reviewed and signed a job description which included a specific mention of the risk of assault by patients.

The hospital generally approached sexual acting out by patients as a clinical issue to be addressed in the patient's treatment program devised by the patient's treatment team. Employees were provided sexual harassment training, but that training did not address conduct by patients.

Female staff at the hospital often felt unsafe. Though the hospital had several policies directed at the safety of staff

members, Dr. Turnbull and others complained these measures were not always effective. Dr. Turnbull comunicated her safety concerns during an Executive Committee meeting in 1995, though those concerns are not reflected in the meeting minutes. The Executive Committee noted in 1996 that another group of staff was expressing fear arising from the safety conditions on the ward.

Other than her testimony to the Executive Committee, Dr. Turnbull made no formal reports of her safety concerns, but had several conversations about safety with her supervisors in the psychology department.

The adolescent had limited treatment facilities. The adolescent unit had no treatment rooms, and the treatment room with a one-way mirror for visual monitoring was in the psychology department in a separate building. During renovations undertaken prior to the decision to close the hospital, Dr. Turnbull requested that the hospital construct a treatment room on the adolescent unit with a large window to provide a safer place to conduct therapy. Such a room was not included in the renovation.

Dr. Turnbull met with female patients and smaller male patients in her office, but preferred not to do so when meeting with larger male patients. The options within the unit were public spaces that provided little protection for confidential conversation, and seclusion rooms furnished with only a mattress on the floor. In pleasant weather, Dr. Turnbull and the other psychologists frequently walked with patients around the hospital grounds as they spoke.

James Stout was admitted to the adolescent unit at TSH in June 1996. Stout was alleged to have assaulted two female staff members at another state hospital prior to his transfer, but that fact was not communicated to TSH. The record does not confirm whether these assaults actually occurred or, if they did, their nature.

Stout's diagnosis on admission was "oppositional defiant disorder," a relatively mild diagnosis for a psychiatric inpatient but one characterized by a tendency toward aggression and difficulty submitting to authority. Dr. Turnbull performed his intake evaluation and noted he had trouble respecting personal boundaries when agitated. Dr. Turnbull did not believe his reports of past rapes and of voices telling him to "kiss" and "feel" somebody. She nonetheless noted in his file that staff should not meet him alone in small, enclosed areas. Dr. Turnbull thereafter continued as part of Stout's treatment team and as his treating psychologist.

Despite Stout's reports to Dr. Turnbull and one period when Mr. Stout was restrained for aggression, his therapy proceeded well, and by August he was allowed the privilege of field trips off the hospital grounds. Stout had several therapy sessions with Dr. Turnbull and was never sexually inappropriate toward her. On August 26, the weather was fine and many people were outside enjoying the day. Dr. Turnbull and Stout headed outside to walk the grounds during their therapy session. When they reached a slightly secluded area, Stout attacked Dr. Turnbull, knocking her to the ground, undressing her and digitally penetrating her, biting and choking her, and repeatedly threatening to kill her. Dr. Turnbull never returned to the hospital following the assault.

The TSH Security Building was next to the adolescent building. Dr. Turnbull did not notify security that she was taking Stout on a walk upon the grounds. Dr. Turnbull did not request that security escort her during her walk, though such was available had she asked. In response to Stout's assault, he was removed from TSH, charged criminally and convicted, never to return to TSH. (App. *infra*, 15a.)

Dr. Turnbull sued TSH and the State of Kansas under Title VII for allowing a sexually hostile work environment to exist at the hospital. During a trial which included nearly seven

days of evidence, TSH made a Rule 50 motion for judgment as a matter of law at the close of plaintiff's evidence and again at the close of all evidence, and argued Dr. Turnbull had not proven a legally sufficient hostile work environment claim. The trial court took each motion under advisement, and the jury began its deliberations.

The jury was asked to determine two issues: whether a sexually hostile work environment existed at TSH and, if so, whether the hospital or state should be held legally responsible. After two half-days of deliberation, the jury reported it was unable to reach a unanimous decision on the second question and felt further deliberation would be fruitless. The trial court revisited the Rule 50 motions and held the evidence had not shown a cognizable claim of gender based sexual harassment and dismissed the case. (App. *infra* 14a.) The trial court then entered judgement for TSH and the State of Kansas. (App. *infra* 13a.)

Dr. Turnbull appealed to the United States Court of Appeals for the Tenth Circuit which reversed. As the harassment at issue was perpetrated by a nonemployee, the Court of Appeals applied what it deemed a negligence analysis, asking whether TSH "fail[ed] to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." (App. *infra* 9a.)

The appeals court noted that, despite the fact Dr. Turnbull had expressed no particular concern about James Stout, the complaints by Dr. Turnbull and others to the Executive Committee about generalized safety concerns, and Dr. Turnbull's conversations with her supervisors regarding "sexual acting out" by other patients, and generalized testimony of a atmosphere of sexual hostility by patients at the hospital was pervasive. From this, the Court of Appeals reasoned: "A reasonable juror could conclude that TSH had

either actual or constructive knowledge of the risk of sexual assault by patients." (App. *infra* 9a.)

The appeals court then concluded that a jury would be justified in finding the measures taken by TSH to ensure the safety of its staff were inadequate. The court noted Dr. Turnbull's contentions that the hospital could and should have done more. The court stated: "More staff would have made the wards safer, as would treatment rooms in visible areas. The hospital could have provided self-defense training and better informed staff how to respond if sexually harassed by a patient. Although screechers were technically available, TSH could have ensured they were given to each staff member and kept in working order." (App. *infra* 11a.)

As the jury had divided on the issue of TSH's liability, the court concluded that a reasonable juror could believe the hospital's preventative measures were inadequate. Thus, the court held Dr. Turnbull had presented sufficient evidence to support a claim of sexually hostile work environment against TSH and held that the grant of judgment for TSH as a matter of law was improper.

REASONS FOR GRANTING THE PETITION

The court of appeals improperly applied Title VII to create a federal remedy for bodily injury to an employee which has heretofore been the exclusive subject of state tort and workers compensation laws. The court of appeals applied a simple negligence standard to impose liability upon one of the several States under Title VII. Title VII itself does not extend so far as to permit the imposition of liability upon any employer for a single incident sexual assault by a non-employee third party. The negligence standard used by the court below conflicts with this Court's decisions under Title IX and the Fourteenth Amendment which require proof deliberate indifference, a much higher degree of culpability.

Moreover, Congress does not possess the constitutional power to impose liability upon the States in the absence of intentional discrimination which violates § 1 of the Fourteenth Amendment. The Eleventh Amendment bars the imposition of liability in the absence of intentional discrimination. Further, the rationale provided by the Tenth Circuit supporting a finding of negligence encroaches upon the day to day operation and budgeting for a State agency and impermissibly infringes upon the rights reserved to the States under the Tenth Amendment.

This Court has not ruled that liability may be imposed under Title VII for conduct by nonemployees based upon mere negligence and absent actual knowledge of such harassment. Those cases which recognize and permit a claim of sexual harassment based upon a sexual assault by a non-employee purport to do so on a negligence standard. *See, e.g., Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997). The Tenth Circuit erroneously relied upon these cases as well as 29 C.F.R. § 1604.11(e)[1] as support for a negligence standard which imposes liability for the failure to "remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."

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[1] 29 C.F.R. § 1604.11(e) provides that, "[a]n employer may ... be responsible for the acts of nonemployees, with regard to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

As noted by Justice Thomas in *Faragher v. City of Boca Raton*, 524 U.S. 775, 811, the EEOC has no substantive rulemaking authority under Title VII, and it is thus inaccurate to refer to § 1604.11 it as a regulation or to give it authoritive weight, and cannot establish negligence per se. *Id.* at 811 (Thomas, J., dissenting).

The *Lockard* and *Crist* cases, while paying lip service to the "should have known" standard articulated in § 1604.11(e), were cases in which the defendant employers had actual knowledge of ongoing harassment of the employees. In *Crist*, the employee after she and others had complained of harassment by a nursing home resident was instructed to subject herself to further harassment to permit the empoyer to observe the conduct. The employee refused and quit. In *Lockard*, the plaintiff had notified her employer that specific customers were harassing her and asked repeatedly that another person serve the customers. The plaintiff was instructed to continue serving the harassing customers and was then assaulted. *Lockard*, 162 F.3d at 1067.

The *Lockard* and *Crist* cases involved actual knowledge of ongoing harassment by specific, identified persons. Here, there was no ongoing harassment by Stout nor had Dr. Turnbull voiced any concerns or complaints regarding Stout. Notwithstanding this lack of complaints concerning Stout, the Tenth Circuit held that TSH had actual or constructive knowledge of the risk of a sexual assault which occurred on August 26, 1996.

The decision below is contrary to this Court's decision in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), in which it was held that harassment by a nonemployee was actionable under Title IX only upon a showing of "deliberate indifference to known acts of harassment." *Id.* at 633. Furthermore, when amending Title VII in 1991, Congress reiterated its intent to redress intentional discrimination. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991) (the purpose of the 1991 Act was to "amend the Civil Rights Act of 1964 ... to provide for damages in cases of intentional employment discrimination.")

In the case at bar, the Tenth Circuit improperly intermingled the diffuse evidence of generalized concerns of

employee safety and "sexual acting out" by other patients with plaintiff's claim which involves a single incident of sexual assault by James Stout. Dr. Turnbull herself did not believe Stout presented a danger to herself. TSH, a state psychiatric hospital, was an inherently dangerous working environment given the nature of the patients the hospital was obliged to admit and treat.

The court of appeals' negligence standard, focusing on whether the employer took "reasonable measures to make the workplace as safe as possible", is a self proving path to strict liability. The court of appeals ignored the lack of notice to TSH that Stout presented a particular risk of sexual assault to Dr. Turnbull or any other employee.

The assailant in this case was a patient in the care, custody, and control of the state hospital. The very nature of the custodial relationship enables a hospital to take measures to prevent a patient from committing an assault. Straight jackets, seclusion rooms, medications such as thorazine, and leather restraints are all measures which could well have prevented the assault by James Stout. When the Tenth Circuit focused only on whether measures were available to make Dr. Turnbull's workplace safer, the court ignored the paramount inquiry of whether TSH had knew that this particular patient presented such a risk so as to warrant extreme preventive measures.

Imposition of liability under Title VII for the failure to take extreme preventive measures infringes upon the patient's liberty interest arising under the Fourteenth Amendment to freedom from bodily restraint as recognized in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, *id.* at 316, this Court recognized that an individual who is involuntarily committed to a psychiatric institution retains a liberty interest in freedom from bodily restraint. Hence, Dr. Turnbull's rights under Title VII, if any, must be balanced against of the

constitutional liberty interest of the hospital's patients in freedom from the very restraints which might prevent physical assaults.

Imposition of liability under Title VII for mere negligence exceeds the scope of the statute itself which addresses intentional discrimination and was not intended to supplant state tort law. This Court has recognized that common law principles are not wholly incorporated into Title VII. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 802, n.3 (1998) (noting that Court must "adapt agency concepts to the practical objectives of Title VII") (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("common-law principles may not be transferable in all their particulars to Title VII")); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). The common law principles applicable to Title VII address principles of agency, which are the express standards set by Congress to determine the vicarious liability of employers for acts of supervisory employees. 524 U.S. at 802. Agency principles do not apply herein as the assault was perpetrated by a non-employee. The standards enunciated by this Court in such instances require a deliberate indifference to known acts of harassment which did not exist in this case.

If Title VII were construed to extend to purely unintentional, negligent conduct, such a construction would violate the Tenth and Eleventh Amendments[2] proscribing the

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[2] The briefs below were directed to how the facts did not meet even the negligence standard for Title VII liability. The jurisdictional bar of Eleventh Amendment Immunity can properly be raised for the first time before this Court. *Ford Motor Co. v. Dep't of the Treasury*, 323 U.S. 459, 467-68 (1944); *Edelman v. Jordan*, 415 U.S. 652, 677-78 (1974).

powers of the Congress and reserving the sovereignty of the States.[3]

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ." U.S. Const. amend. XI. This Court interpreted this Amendment it to apply to law suits brought against a State by citizens of that State. See ***Kimel v. Florida Bd. of Regents***, 528 U.S. 62, 72-73 (2000); and ***Seminole Tribe of Fla. v. Florida***, 517 U.S. 44, 54 (1996). The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued in federal court by private individuals. See ***Kimel***, 528 U.S. at 73.[4]

This Court has drawn a distinction of constitutional proportion between negligent and intentional misconduct. ***Daniels v. Williams***, 474 U.S. 327 (1986). This Court has

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[3] Petitioner does not herein challenge Congress' power, under § 5 of the Fourteenth Amendment to enact legislation prohibiting intentional discrimination on the basis of gender or race. Indeed, this Court held in ***Fitzpatrick v. Bitzer***, 427 U.S. 445 (1976), that the Congress had acted pursuent to § 5 of the Fourteenth Amendment to subject states to suits for damages in federal court. ***Fitzpatrick*** addressed a pension plan which discriminated against males. Though this holding has been called in to question by this Court's recent line of cases addressing the Eleventh Amendment, the Congress' power to apply Title VII's prohibition against intentional discrimination to the states need not be addressed herein.

Petitioner herein challenges a construction of Title VII which would extend the its scope beyond the reach of § 1 of the Fourteenth Amendment to seek to redress unintentional negligence, thereby supplanting state tort and workers' compensation laws.

[4] The Kansas Supreme Court recently held that only the Kansas legislature can waive the State's sovereign immunity and that a waiver cannot be based on acts of agents. ***Connelly v. State Highway Patrol***, 26 P.3d 1246, 1259 (Kan. 2001).

made clear, when addressing claims under the Due Process Clause of the Fourteenth Amendment, that mere negligence is insufficient to implicate the rights protected by the Fourteenth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998) (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976); and *Daniels v. Williams*, 474 U.S. at 332). In *Board of Trustees of The University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 966 (2001), this Court stated: "Although disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny." (Internal citation omitted.) *See also DeShaney v. Winnebago County*, 489 U.S. 189, 197 (1989) ("a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.")

This Court adhered to the distinction between negligence and intentional misconduct in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), in which this Court held that liability under Title IX for harassment by a nonemployee could exist only upon a showing of "deliberate indifference to known acts of harassment." *Id.* at 633.

Congress, though empowered to enforce the Fourteenth Amendment, does not possess the power "'to determine what constitutes a constitutional violation.'" *Kimel*, 528 U.S. at 81 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)). The Court, not Congress, defines the substance of constitutional guarantees. *Garrett*, 121 S. Ct. at 963. Congress can enact legislation to remedy or prevent conduct that violates the Fourteenth Amendment, but Congress cannot redefine or expand the substance of the Fourteenth Amendment itself. This Court requires a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Kimel*, 528 U.S. at 81 (quoting *City of Boerne*, 521 U.S. at 520). Congress must

carefully tailor its legislation so that it enforces the Fourteenth Amendment without altering the Amendment's meaning.

The "congruence and proportionality" test requires examination of the scope of the statute to determine whether it is consistent and compatible with the Fourteenth Amendment, or whether it expands the Amendment by prohibiting more State action than would be unconstitutional. *City of Boerne*, 521 U.S. at 532; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646-47 (1999); *Kimel*, 528 U.S. at 86. The Court has also considered whether Congress identified in the legislative record a pattern of unconstitutional conduct by the States (that was targeted by the statute at issue) in order to determine whether the statute is a proportional response to unconstitutional State action. *City of Boerne*, 521 U.S. at 530; *Florida Prepaid*, 527 U.S at 640; *see also Kimel*, 528 U.S. at 88; *Garrett*, 121 S. Ct. at 964.

In four recent cases, the Supreme Court has held that Congress exceeded its § 5 enforcement powers. In each case, the Court found that the statute in question prohibited substantially more State action than would be unconstitutional. *See City of Boerne*, 521 U.S. at 532-34 (the restrictions of the Religious Freedom Restoration Act ("RFRA") far exceed any pattern or practice of unconstitutional conduct by the States under the Free Exercise Clause); *Florida Prepaid*, 527 U.S at 646-47 (under the Patent Remedy Act, an unlimited range of State conduct would expose a State to claims of patent infringement); *Kimel*, 528 U.S. at 86 (the Age Discrimination in Employment Act ("ADEA") prohibits substantially more state employment decisions and practices than would likely be held unconstitutional); *Garrett*, 121 S. Ct. at 967 (the Americans with Disabilities Act ("ADA") imposes restrictions that far exceed those of the Fourteenth Amendment's Equal Protection Clause). The Court also concluded in each case

that Congress had not identified in the legislative record a pattern of unconstitutional conduct by the States that was targeted by the statutes. *See City of Boerne*, 521 U.S. at 530 (RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry); *Florida Prepaid*, 527 U.S. at 640 ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *Kimel*, 528 U.S. at 89 ([In enacting the ADEA], "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); *Garrett*, 121 S. Ct. at 966 ("Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.").

The Fourteenth Amendment prohibits intentional discrimination or disparate treatment on the basis of race or gender by states unless they satisfy a difficult burden, *see Washington v. Davis*, 426 U.S. 229, 239 (1976) (race); *United States v. Morrison*, 529 U.S. 598 (2000) (gender). Title VII itself prohibits intentional discrimination. See 42 U.S.C. § 2000e-2(a). The application of Title VII by the Tenth Circuit herein discarded the constitutional requisite of intentional discrimination and looked only for negligent conduct. This is an illogical extension of the text of Title VII and a departure from this Court's clear guidance in cases decided under Title IX and directly under the Fourteenth Amendment. This Court has announced on many occasions

that mere negligence does not meet the threshold of a constitutional violation.[5]

The formula adopted by the Tenth Circuit expands Title VII far beyond the its intended scope of redressing intentional discrimination. As such, the construction given to Title VII below is neither congruent nor proportional with the injury sought to be remedied by Title VII (intentional discrimination by employers and their agents). The decision below effectively turns Title VII into a federal cause of action which supplants state tort law and workers' compensation laws.

In *Printz v. United States*, 521 U.S. 898 (1997), the this Court invalidated, under the Tenth Amendment, a provision of federal law requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers. The *Printz* Court stated:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Id. at 935.

Similarly, Congress cannot conscript State agencies and their budgets under Title VII to obviate all possible acts of violence against women. This Court held in *United States v. Morrison*, 529 U.S. 598 (2000), that Congress lacked the

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[5] *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (deliberate indifference required to show claim of inadequate training); *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (mere negligence on the part of a state actor does not constitute a deprivation of due process under the Constitution).

power to enact a civil remedy for violence against women when that remedy was at least directed to the perpetrator. The decision below seeks instead to create a remedy against an employer for crimes perpetrated by non-employees.

Under the formula applied below, the State of Kansas could be held liable, under Title VII, for a sexual assault of an employee walking to her car in a darkened parking lot. The decision below holds the State strictly liable based on the simple foreseeability of a criminal act.

The decision below grafts a new federal remedy upon Title VII for conduct which is clearly not intentional discrimination. Liability is imposed for mere negligence in failing to anticipate and prevent a crime. Liability under such circumstances deviates from the clear guidance provided by this Court and expands the scope of Title VII beyond its constitutionally permissible reach.

CONCLUSION

The decision below improperly expands Title VII liability to encompass merely negligent conduct. In so doing, the Tenth Circuit ignores this Court's precedent under Title IX and the Fourteenth Amendment and throws open the federal courthouse door to a class of actions which have traditionally and appropriately been the exclusive province of state law governing negligence and workers compensation.

The Tenth Circuit's application of Title VII liability upon a State for merely negligent conduct gives a construction to Title VII which clearly exceeds Congress' constitutional authority to legislatively remedy intentional discrimination under the Fourteenth Amendment.

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

PUBLISH

FILED
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
JUL 5 2001
PATRICK FISHER
CLERK

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CYNTHIA TURNBULL,

Plaintiff-Appellant,

v. No. 00-3086

TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 98-CV-2222-GTV)

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Before **TACHA,** Chief Judge, **SEYMOUR** and **BRORBY,** Circuit Judges.

SEYMOUR, Circuit Judge.

Plaintiff/Appellant Cynthia Turnbull, a psychologist at the Topeka State Hospital (TSH) in Kansas, sued her employer and the state for sexual harassment after she was sexually assaulted by a patient. The jury found a sexually hostile work environment existed at TSH, but it split over whether TSH should be held legally responsible for that environment. After learning of the jury's inability to decide, the district court granted an earlier defense motion for judgment as a matter of law. The sole issue on appeal is whether that ruling was proper. We hold that it was not, and remand the case for further proceedings.

I

We review de novo a grant of judgment as a matter of law. *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001). Rule 50 of the Federal Rules of Civil Procedure authorizes a trial judge to grant judgment as a matter of law "if, after a party has been fully heard on an issue, there is no legally sufficient evidentiary basis for a reasonable jury to find for the party . . . ." *Id.* Because a court does not lightly presume the decision of a reasonable juror, judgment "may be granted only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *Id.* (internal quotations omitted). Thus, when a defendant seeks judgment as a matter of law, the controlling question is whether the plaintiff has arguably proven a legally sufficient claim.

In making that determination, "[w]e do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for that of the jury." *Pizza Hut v. Lockard*, 162 F.3d 1062, 1068 (10th Cir. 1998) (quotations and

citations omitted). Instead, we view "the facts and all reasonable inferences from them . . . in the light most favorable to the appellant." *Phillips*, 244 F.3d at 796. Accordingly, although the parties set forth varying versions of the underlying facts, we consider those facts in the light most favorable to Dr. Turnbull.

II

Topeka State Hospital was a state-run inpatient mental health center[1] which treated patients with severe mental illnesses for whom outpatient treatment options had failed. TSH was not a jail. Patients were treated in the least restrictive environment possible, although all patients had been admitted because they posed some danger to themselves or others. While the hospital had an obligation to admit anyone referred there, unusually violent offenders could be transferred to more secure facilities.

Cynthia Turnbull, a Ph.D. psychologist, came to TSH in 1993. She was hired to start a group therapy program for the adolescent treatment unit and to conduct individual and group therapy with adolescent male inpatients. One treatment issue that arose regularly was the "sexual acting out" displayed by many of the patients. TSH staff were aware this posed potential dangers, dangers that were tragically highlighted when a female employee was murdered by a patient in 1992. Dr. Turnbull recognized the risks of her job, and the hospital required that she regularly review and sign a job description that included mention of the risk of assault by patients. The hospital's general approach toward sexual acting out by patients, however, was that it was a clinical issue to be addressed in the patient's treatment program. The sexual harassment training that was required for each new staff member made no mention of how to respond to sexual harassment by patients.

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[1] The hospital closed in 1997.

Chronic understaffing at the hospital meant female staff often felt unsafe. While the hospital had several policies directed at the safety of staff members, Dr. Turnbull and others complained these measures were not always effective. For example, TSH staff received training in managing assertive or unruly patients, but the training focused on appropriate ways to calm the patient rather than self-defense to protect the staff member. Although psychologists could request extra staff to attend a group therapy session or other treatment, the shortage of staff meant those requests were rarely met. The hospital purchased personal alarms known as "screechers" after the 1992 murder, but they had fallen out of use by the time Dr. Turnbull started work and she was never told of their availability. Dr. Turnbull testified about her safety concerns before an Executive Committee meeting in 1995, but she alleges the meeting minutes were later "sanitized" to remove all mention of her concerns. The Executive Committee did note in 1996 that another group of staff was expressing a "reality based fear" of conditions on the ward.

Other than her testimony to the Executive Committee, Dr. Turnbull made no formal reports of her safety concerns. She describes several conversations about safety with her supervisors in the psychology department. Both warned her not to send memoranda or file incident reports because her career would be hurt if the administration began to view her as a troublemaker.

The safety concerns were exacerbated for the psychologists because of a lack of adequate treatment facilities on the adolescent unit. There were no treatment rooms within that unit, and the one treatment room with a one-way mirror for visual monitoring was on an isolated floor in a separate building. During renovations on the adolescent unit, Dr. Turnbull requested that the hospital construct a treatment room with a large window in order to provide a safe place to conduct therapy, but no such room was provided. Dr.

Turnbull met with female patients and smaller male patients in her office, but she was uncomfortable meeting with larger males in the small, enclosed space. The only other options within the unit were public spaces that provided little protection for confidential conversation, and tiny seclusion rooms whose only furniture was a mattress on the floor. In pleasant weather, Dr. Turnbull and the other psychologists frequently solved the space dilemma by walking with patients around the hospital grounds as they spoke.

A patient named James Stout came into this environment in June 1996. Mr. Stout had sexually assaulted two female staff members at another state hospital prior to his transfer, but that fact was not communicated to TSH. His diagnosis on admission was "oppositional defiant disorder," a relatively mild diagnosis for a psychiatric inpatient but one characterized by a tendency toward aggression and difficulty submitting to authority. Dr. Turnbull performed his intake evaluation and noted he had trouble respecting personal boundaries when agitated. Although she did not believe his reports of past rapes and of voices telling him to "kiss" and "feel" somebody, she noted in his file that staff should not meet him alone in small, enclosed areas.

Despite these early warnings and one period when Mr. Stout was restrained for aggression, his therapy proceeded well, and by August he was allowed the privilege of field trips off the hospital grounds. He had several therapy sessions with Dr. Turnbull and was never sexually inappropriate toward her. On August 26, the weather was fine and many people were outside enjoying the day, so they headed outside to walk the grounds during their therapy session. When they reached a slightly secluded area, he suddenly attacked. He knocked her to the ground, undressed her and digitally penetrated her, bit and choked her, and repeatedly threatened to kill her. Dr. Turnbull suffered post-traumatic stress disorder after the assault and never returned to the hospital.

In addition to filing criminal charges against James Stout, Dr. Turnbull sued TSH and the State of Kansas under Title VII for allowing a sexually hostile work environment to exist at the hospital. At trial, the jury heard almost seven days of evidence. TSH made a Rule 50 motion for judgment as a matter of law at the close of plaintiff's evidence and again at the close of its own, arguing Dr. Turnbull had not proven a legally sufficient hostile work environment claim. The court took each motion under advisement, and the jury began its deliberations.

The jury was asked to determine two issues: whether a sexually hostile work environment existed at TSH and, if so, whether the hospital or state should be held legally responsible. After two half-days of deliberation, the jury reported it was unable to reach a unanimous decision on the second question and felt further deliberation would be fruitless. The court revisited defendants' Rule 50 motions at that time, holding without discussion that the evidence had not shown a cognizable claim of gender based sexual harassment and dismissing the case.

III

"Sexual harassment is actionable under a hostile work environment theory when the harassing conduct is 'sufficiently severe or pervasive to alter the conditions [of the victim's] employment and create an abusive working environment.'" *Lockard*, 162 F.3d at 1071, quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). There is no "mathematically precise test" for determining whether the conduct is sufficiently severe or pervasive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). Some factors to be weighed include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. Because frequency is merely one factor in the analysis, an isolated incident may suffice if the conduct is severe and

threatening. *See, e.g., Lockard*, 162 F.3d at 1072 (allowing claim based on single incident); *Smith v. NW Fin. Acceptance Corp.*, 129 F.3d 1408, 1413 (conduct must be "sufficiently pervasive *or* sufficiently severe"). The harassing conduct must be "both objectively and subjectively abusive." *Lockard*, 162 F.3d at 1071.

Here, the jury found Dr. Turnbull was subjected to a sexually hostile work environment. *See* R. at 1458. We easily conclude that determination was not unreasonable. While there was only one incident,[2] it was objectively abusive, dangerous, and humiliating, and Dr. Turnbull was so traumatized she was unable to return to work thereafter. TSH argues any dangers inherent in the hospital environment could not constitute sexual harassment because the male staff members were also subject to sexual comments or physical attack by patients. However, conduct that affects both sexes may constitute sexual harassment if it disproportionately

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[2] Title VII provides that an employee must file a complaint with the Equal Employment Opportunity Commission within three hundred days of the acts about which she complains. *See* 42 U.S.C. § 2000e-5(e). Counting back three hundred days from the date Dr. Turnbull filed her complaint yields a date of July 19, 1996, approximately five weeks before her attack. Accordingly, TSH argues any events that took place before that date are time barred and must not be considered. In response, Dr. Turnbull argues the environment that existed throughout her employment constituted *continuing* sexual harassment and should be considered as a whole. *See Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1414-16 (10th Cir. 1993) (discussing continuing course of conduct for sexual harassment under Title VII).

It is undisputed that the attack itself took place within the statutory time period. Because the attack itself is sufficient to support a claim for sexual harassment and Dr. Turnbull does not specify other incidents as bases for her claim, we treat the attack as a single incident of harassment. However, we examine other events in the record to determine the general environment at the hospital, whether TSH was on notice of employee sexual harassment concerns, and whether the hospital took reasonable measures to ensure the safety of its employees.

affects female staff. *See Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997) (assaults on female staff sexual harassment even though patient also assaulted male staff member). The male staff of TSH were not subject to the fear or the reality of sexual assault in the same manner as the female staff. We turn, therefore, to the more difficult question of whether TSH should be legally liable for the harassment.

We have held that an employer may be responsible for sexual harassment based upon the acts of nonemployees. *Lockard*, 162 F.3d at 1073 (restaurant responsible for acts of customers); *see also Crist*, 122 F.3d at 1108 (group home liable for acts of mentally incapacitated resident); 29 C.F.R. § 1604.11(e) (employer may be responsible for acts of non-employee where employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action"). To protect against imposing strict liability upon employers, we apply a negligence analysis, asking whether the organization "fail[ed] to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Lockard*, 162 F.3d at 1074, *citing Hirschfeld v New Mexico Corrections Dept.*, 916 F.2d 572, 577 (10th Cir. 1990); 29 C.F.R. § 1604.11(e) (employer liable if "fails to take immediate and appropriate corrective action"). The focus is not on the conduct itself but on the employer's behavior in response; a hospital cannot control every act of its patients, but it does control the environment at large. *Crist*, 122 F.3d at 1110-12.

The negligence analysis can be divided into two separate inquiries, looking "first, into the employer's actual or constructive knowledge of harassment, and second, into the adequacy of the employer's remedial and preventative responses." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998). With regard to knowledge, a plaintiff may prove actual knowledge based on her reports of harassment to management-level employees or constructive knowledge

based on the pervasiveness of the sexual hostility within the working environment. *Id.* While Dr. Turnbull made no complaints about James Stout in particular prior to the attack, she spoke about general safety concerns with her supervisors on multiple occasions, even bringing those concerns to the hospital's Executive Committee. Trial testimony established that the atmosphere of sexual hostility at the hospital was pervasive. Indeed, part of TSH's defense is that the dangers were so obvious that employees knowingly assumed those risks through their continued employment. A reasonable juror could conclude that TSH had either actual or constructive knowledge of the risk of sexual assault by patients.

The final question, whether TSH responded appropriately to the known dangers on the adolescent unit, is the real crux of this case. We have established no bright-line rule for measuring the "appropriateness" of an employer's response, asking instead whether the response was reasonable under the circumstances. *Id.* at 675-76. Key factors in that determination are the promptness and effectiveness of any action. *Id.* at 676. It is not always possible for an employer to completely eliminate offensive behavior, and thus the effectiveness inquiry looks not to whether offensive behavior actually ceased but to whether the "remedial and preventative action was reasonably calculated to end the harassment." *Id.* We also consider "the appellants' expectations given their choice of employment." *Crist*, 122 F.3d at 1111. In an environment like TSH it would be impossible to eliminate all potential risk; instead, we ask whether the hospital took reasonable measures to alleviate known or obvious risks.

TSH contends that "[i]n an environment like TSH, where the patients were

. . . a danger to themselves or others, employees like plaintiff inherently assume the risk of facing sexually hostile, aggressive patients." Aplee. Br. at 50. In support of this theory, it cites cases which held prisons were not liable for sexual harassment or sexual assaults by an inmate. *See, e.g.,*

Powell v. Morris, 37 F.Supp.2d 1011 (S.D. Ohio 1999); *Hicks v. Alabama*, 45 F.Supp.2d 921 (S.D. Ala. 1998). This argument overlooks the continued emphasis on the employer's preventive measures, however. As explained in one case, "Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, ***as long as the defendant institution took proper preventative and remedial steps*** with regard to inmate behavior." *Powell*, 37 F.Supp.2d at 1017 (emphasis added); ***see also Hicks***, 45 F.Supp.2d at 933 (prison not liable where plaintiffs could identify no extra measures that could have prevented incident). Even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible.

It is undisputed that TSH took some measures to ensure the safety of its staff. Nevertheless, Dr. Turnbull contends the hospital could have, and should have, done much more. More staff would have made the wards safer, as would treatment rooms in visible areas. The hospital could have provided self-defense training and better informed staff how to respond if sexually harassed by a patient. Although screechers were technically available, TSH could have ensured they were given to each staff member and kept in working order. Because the jury was divided on the issue of TSH's liability, we can deduce that one or more jurors believed the hospital's preventative measures were inadequate. We can not say that determination would be unreasonable as a matter of law on this record. Applying all reasonable inferences in favor of Dr. Turnbull, we conclude she presented sufficient evidence to support a claim of sexually hostile work environment against TSH. Accordingly, we hold that the grant of judgment for TSH as a matter of law was improper.

We **REVERSE** the district court's judgment in favor of TSH and **REMAND** for a new trial.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CYNTHIA TURNBULL,
Plaintiff-Appellant,
v. No. 00-3086
TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,
Defendants-Appellees.

ORDER
Filed August 10, 2001

Before **TACHA,** Chief Judge, **SEYMOUR** and **BRORBY,** Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active services as required by Fed.R.App.P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered by the Court
PATRICK FISHER, Clerk of the Court
by: /s/_____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CYNTHIA TURNBULL,
Plaintiff,

v. Civil No. 98-2222-GTV

TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,
Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

This action came on for trial before the court an a jury, and the issue were duly tried. The jury was unable to reach a unanimous agreement upon a verdict. The court then rendered its decision on defendants' motion for judgment as a matter of law which the court had taken under advisement.

IT IS ORDERED AND ADJUDGED that plaintiff to take nothing and the action is dismissed on the merits, and that the defendants Topeka State Hospital and the State of Kansas to recover from plaintiff Cynthia Turnbull their costs of action.
Dated: February 28, 2000

RALPH L. DeLOACH, CLERK
by: /s/
Michelle Union, Deputy Clerk
ENTERED ON THE DOCKET DATE: 3/1/00

Transcript of Trial, p. 1381 line 14 to p. 1382 line 8:

THE COURT: Is there any member of the jury who does not concur with what Miss Waggoner has just said? Is there any of you who feels that further deliberations would bear fruit? None appearing.

Well, in that case, I'm going to determine that the jury is deadlocked and unable to come to an agreement and you are then discharged from any further consideration of the case.

Now I have two motions for judgment as a matter of law under advisement that were filed by the defendants in the case and the motions will be granted. The court determines that the jury—a jury is not able to come to an agreement and then—but I determine on my own that the evidence has failed to establish a submissible claim of gender based sexual harassment. And so the Rule 50 motions are granted. Case is dismissed.

Transcript of Trial, p. 676 lines 1 to 22:

Q. And then what happened?
A. And he was removed from the grounds and later convicted?
Q. Did James Stout ever return back to the hospital?
A. No.
Q. That was the last day, August 27, 1996 that he was at the hospital?
A. I believe so, yes.
Q. What time of day was it that this assault took place?
A. It was approximately eleven a.m.
Q. And during that time you were in the security building next to the adolescent unit?
A. Yes.
Q. Had you been informed by Dr. Turnbull that she was taking James Stout on a walk on the grounds?
A. No.
Q. Had you been asked to provide an escort?
A. No.
Q. Were you available to provide an escort if so requested?
A. Yes.

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

(2)

No. 01-692

IN THE
Supreme Court of the United States

TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,

Petitioners,

v.

CYNTHIA TURNBULL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the uniform rule in the federal courts that an employer may be liable under Title VII for failing to remedy a hostile sexual environment about which the employer had actual or constructive knowledge.

2. Whether, in the absence of a record from the Tenth Circuit in this case and/or any relevant conflict among the lower federal courts, this Court should review the State's heretofore unarticulated issue of whether a Title VII case based upon negligence impermissibly infringes upon a State's sovereign immunity.

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INTRODUCTION

This is a classic hostile environment sexual harassment case premised on an employer's misconduct for taking no action in the face of known sexual harassment and assault of its female employee by third parties. Cynthia Turnbull complained repeatedly to Petitioner Topeka State Hospital, a State-run entity ("TSH" or "the State"), that she was experiencing sexual harassment at work and suggested specific remedial measures, but TSH intentionally chose to do nothing. Thereafter, Turnbull suffered a vicious sexual assault and attempted rape by a third party under the control of the State under circumstances that would have been avoided had TSH acted upon Turnbull's complaints and implemented remedial measures.

The State of Kansas mischaracterizes this case as one involving a single incident of "bodily injury" and argues it should be immune from such claims. Of course, bodily injury, when in the form of a sexual assault and when, as here, preceded by numerous instances of unchecked sexual acting out, may form the basis of a claim for sexual harassment under Title VII. Although on appeal to the Tenth Circuit the State argued that a negligence standard should govern Turnbull's claim under Title VII, the State now claims for the first time that imposition of the negligence standard violates the State's sovereign immunity. Thus, the State encouraged Turnbull to invoke and the lower federal courts to decide this case under Title VII negligence principles, only to cry foul when the facts ultimately supported Turnbull. The State should be judicially estopped from pursuing such whipsaw tactics.

Moreover, with respect to the newly injected question of the State's Eleventh Amendment immunity, there is no record below — as the Tenth Circuit never considered the issue — and no conflict among the circuits. In short, this case is factually, legally, and procedurally inappropriate for Supreme Court review, and there is no reason for this Court to grant certiorari.

STATEMENT OF FACTS

TSH and the State of Kansas employed Turnbull as a psychologist from September 1993 until she was laid off in connection with TSH closure on March 21, 1997. After she was sexually assaulted and strangled by a male TSH patient on August 27, 1996, Turnbull took a medically-necessary leave of absence that continued until her formal termination.

A. Background

At all relevant times, TSH was a residential mental hospital operated under the direction of the Department of Social and Rehabilitation Services ("SRS"), an agency of the State of Kansas. During the time Turnbull was employed at TSH, the State operated four residential mental health facilities: TSH, Larned State Hospital ("LSH"), Ossawatomie State Hospital ("OSH"), and Rainbow Mental Health Facility.

Turnbull worked as a psychologist on the adolescent unit at TSH. Adolescent male patients at TSH could be as old as age 18 and were often physically mature. At trial, Turnbull obtained admissions from several of TSH's managers and executives that female employees were often sexually harassed by male patients but that the State considered the harassment "part of the job" and chose to do nothing about it.

B. Hostile Environment — What Turnbull and Others Endured

During almost her entire term of employment with TSH, Turnbull and other female employees were subjected to sexual acting out by male TSH patients. Adolescent males were among the most difficult to deal with because they tended to act out sexually toward other patients and staff. Turnbull's direct supervisor admitted sexual comments and sexual acting out by male patients toward staff were generally considered "part of the job" at TSH. Adolescent males tended to take a "macho stance" with female employees. Dr. Denman, another female psychologist, testified it was "fairly common" for some of the male patients to rub up against female staff or try to touch their breasts. She testified she was sexually harassed by psychiatric patients at TSH.

Another female employee testified male patients regularly made sexual comments toward female staff, unnecessarily touched or brushed up against staff members' bodies, and talked about having sexual intercourse with them. At least four (4) female employees at State psychiatric hospitals were brutally sexually assaulted (and one was killed) between 1992 and August 1996.[1] The State failed to present any evidence male employees were ever sexually assaulted at TSH. In fact, the State's Chief of Security at TSH admitted that in his 21 years at TSH, he was unaware of any male employees ever being sexually assaulted at State hospitals.

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1. The four females were Stephanie Uhlrig, who was sexually assaulted and murdered, Turnbull, and two female employees who were sexually assaulted by the same patient who attacked Turnbull.

Turnbull testified the adolescent males on the unit had "raging hormones" and "a lot of sexual urges," combined with a very immature, primitive impulse control. That combination resulted in frequent sexual acting out on the adolescent unit. While attempting to treat the adolescent males, Turnbull experienced lewd sexual remarks, groping and grabbing, and vulgar sexual gestures. Turnbull recalled the adolescent male patients would brush or rub their "private parts" up against her and/or attempt to touch her private parts.

Turnbull testified about a time when a male patient reached up under her dress and grabbed her thigh. She related an instance when a male patient grabbed her breast and attempted to grab other parts of her. She testified about occasions when male patients grabbed her hair, her arm, and/or her body and pushed her in ways that were controlling and sexually motivated. Turnbull testified that, during group sessions she conducted with male patients, she regularly became frightened and uncomfortable because the male patients were sexually acting out toward her. Turnbull testified she endured these sexually harassive acts — including comments, propositions, sexual name calling, and groping or rubbing of private parts — on a weekly, if not daily basis. Additionally, Turnbull related she was frightened because she knew that another female employee, Stephanie Uhlrig, had previously been sexually assaulted and murdered by a male TSH patient. Turnbull was so frightened, in fact, that she would get up from a group session and the back of her shirt would be wet with sweat.

In spite of the clear risk of sexual harassment and assault, TSH provided inadequate sexual harassment and self-defense training. TSH trained Turnbull that sexual harassment occurred between co-workers or between a co-worker and a

supervisor. TSH never acknowledged to Turnbull that patients could sexually harass staff or that she had the right to complain about sexual harassment by patients. TSH provided no training to help Turnbull and other female staff cope with and defend themselves against such sexual harassment. Indeed, Dee Lowe, TSH Personnel Director, believed the TSH sexual harassment policy did not even apply to sexual harassment by patients. Instead, she considered such acts a "clinical issue." In fact, during one sexual harassment training session, a staff member asked Ms. Lowe a question about sexual harassment by patients. Ms. Lowe specifically responded that was a clinical issue with which the TSH Personnel Department would not deal.

Additionally, witnesses consistently agreed TSH was chronically understaffed to provide a secure environment for female employees. Females wanted more staff, including more male staff, to help control the male patients. There were no treatment rooms on the adolescent unit, which necessitated that staff members take male patients off the units — to either secluded treatments room elsewhere on campus or for walks on the campus grounds — for private therapy. TSH failed or refused to put alarms in the psychologists' offices and/or provide them with personal alarms ("screechers"), which could have been purchased for $5.99 a piece, or any other means of protection.

C. The State's Knowledge of the Hostile Environment and Risk of Sexual Assault

Prior to the sexual assault of Turnbull on August 27, 1996, TSH's executive and management employees were well aware of the male patients' propensities to act out sexually toward females at TSH, but took no effective preventative

or remedial action to ensure that Turnbull and/or other female employees would be safe from harassment. Among other things, the 1992 sexual assault and murder of Stephanie Uhlrig on the TSH campus by a male TSH patient was a well-publicized event that caused the female staff great concern.

In May 1996, the TSH Executive Committee recognized that staff members exhibited "a reality based fear" about safety on the units. In fact, in July 1996, only one month before Turnbull was sexually assaulted, the staff's safety concerns were so pronounced and well known that the Executive Committee discussed transferring patients to other State hospitals. These transfers never occurred. Indeed, even in October 1996 — six weeks after Turnbull was sexually assaulted — the TSH Risk Management Committee recognized that TSH's inability to transfer patients, combined with continuous admissions, still caused female staff grave concern about their safety.

The TSH Director of Psychology, Magdalene Kovach, reluctantly testified male patients made frequent comments of a sexual nature toward her. She knew patients unnecessarily brushed or rubbed up against staff members' bodies. Dr. Kovach admitted she had been accosted in a sexual way that did not progress to rape. Indeed, she considered it a well-known risk that patients at TSH could act out sexually. She also agreed that the risk of being touched sexually by patients was greater for female staff than for male staff. In fact, she considered the greater risk to female staff as just "in the nature of being female." She considered the instances of sexual assault as one of the job hazards at TSH — simply part of the job description.

Turnbull's direct supervisor, Dr. Lou Hoover, was also well aware of the sexual environment at TSH. Dr. Hoover, a female, admitted sexual comments and sexual acting out by male patients toward staff were just generally considered part of the job at TSH. She admitted the risk of sexual assault was greater for female staff than for male staff. Her observation was that adolescent male patients tended to take a macho stance with female staff, did not like to be told what to do by female staff, and that male staff tended to have more control over the male patients.

Janet Metz, TSH Nursing Supervisor, likewise admitted she knew male adolescent patients made sexual comments and threats to staff members on a daily basis. She understood female staff at TSH faced a greater risk of sexual assault than male staff. Ms. Metz's nursing staff asked her for more male staffing to help control the situation, but TSH took no such action.

D. Turnbull's Complaints and Requests for Remedial Measures and the State's Refusal to Remedy the Known Sexually Hostile Environment

In addition to the knowledge TSH already had about the sexually hostile environment based on its supervisors' and employees' experiences, Turnbull specifically complained about the sexual comments and acts she experienced and the danger to female staff members. On the occasion when the male patient reached under Turnbull's skirt and grabbed her upper thigh, Turnbull complained about the incident to Dr. Kovach and discussed whether she should file an Incident Report. Dr. Kovach discouraged Turnbull from reporting the incident, and told her she would be viewed as a troublemaker if she did.

Turnbull also kept Dr. Hoover, her supervisor, aware of the harassment she endured from male patients. Turnbull reported to Dr. Hoover that male patients were making inappropriate sexual comments to her and she felt harassed. She told Dr. Hoover that the harassment made her "very uncomfortable" and that she was unable to redirect the male patients herself. Dr. Hoover and Turnbull discussed the fact that a male staff member was supposed to help Turnbull with the male patients, but he did not show up for the sessions. Dr. Hoover admitted both she and Turnbull had agreed that Turnbull would benefit from having a male staff member help control the male patients. In addition to the fact that a male staff member was rarely, if ever, present, Turnbull complained to Dr. Hoover about the chronic understaffing on the adolescent unit. Dr. Hoover told Turnbull understaffing was a controversial topic TSH administration did not want to hear about. In these conversations with Dr. Hoover, Turnbull specifically raised the need for additional male staffing on the adolescent unit.

On April 5, 1995, Turnbull took her concerns about the sexually hostile environment to a meeting of TSH administrative department heads, including, among others, Randy Proctor, TSH Superintendent; Dr. Kovach, TSH Director of Psychology; and Ms. Metz. At the meeting, Turnbull reported the female staff members were frightened and needed additional male staff on the unit, because male staff tended to have a pacifying effect on the patients

Following the administrative meeting, TSH published a set of minutes that accurately reflected Turnbull's concerns about the dangerous environment for women and her suggestions for improvements. A day later, TSH recalled the original minutes and distributed a new version that sanitized

Turnbull's statements and did not reflect her concerns about the hostile sexual environment.

Because the State failed to take any remedial action after the April 5, 1995 meeting — and because the meeting minutes had been sanitized — Turnbull prepared to write a memorandum to TSH administration outlining her complaints and suggestions. In May 1995, Turnbull discussed her plan with Dr. Kovach, TSH Director of Psychology. Dr. Kovach told Turnbull to "relax about safety issues on the adolescent unit." She directed Turnbull not to write the proposed memorandum. Dr. Kovach also warned Turnbull that Mr. Proctor (TSH Superintendent) believed the psychologists were "stirring up trouble." She further warned Turnbull that Mr. Proctor would "come down on troublemakers like a ton of bricks." Because she wanted to keep her job, Turnbull did not write the proposed memorandum.

Moreover, the TSH administration specifically warned Turnbull and others not to raise the issue of understaffing with Joint Commission for Accreditation of Healthcare Organizations ("JCAHO") auditors, independent investigators who periodically review healthcare organizations. TSH warned employees that such complaints could "backfire" and the hospital could lose its accreditation. Dr. Hoover admitted at trial that it was "fairly routine" to remind employees not to draw attention to problems.

As described above, Turnbull and other women continually complained about the need for greater security and protection of female staff and the critical understaffing at TSH — specifically the absence of male staff. In light of concerns for their safety, Turnbull and Laura Talley asked for an additional staff member to accompany them to a series

of group therapy sessions they conducted in another building on campus. Out of the approximately 50-80 times they requested additional staff, they received such assistance only approximately 5 or 6 times, at most. TSH managers told Turnbull and Dr. Talley there were not enough staff to send one with them.

Turnbull requested that TSH construct a treatment room with a plexiglass viewing window on the adolescent unit so private therapy sessions could be conducted by female psychologists, but observed by others to prevent dangerous attacks. Under the then-existing system, to conduct private therapy, psychologists such as Turnbull had to take patients, alone, either to their private offices, on walks around the campus, or to other buildings on campus where treatment rooms existed. None of these was a safe option for female staff. TSH failed to construct such a treatment room, in spite of the fact TSH had remodeled the adolescent unit during Turnbull's employment.

Prior to Turnbull's sexual assault on August 27, 1996, the State had not implemented any of her suggestions or taken any other steps to remedy the sexually hostile environment at TSH. To the contrary, the State had not even taken the additional safety precautions it had represented to the Legislative Post Audit Committee it would take following the sexual assault and murder of Stephanie Uhlrig in 1992.[2]

During the 1992 legislative post audit investigation, TSH represented it would undertake additional training on youth

2. Following the brutal sexual assault and murder of Ms. Uhlrig in 1992, TSH was investigated by a State committee, the Legislative Post Audit Committee, to review conditions at the hospital and make recommendations for change.

gangs and working with dangerous people. TSH never did. In fact, the State expressly refused to provide TSH staff with self-defense training to fend off a sexual attack. In light of the staff uprising after the Stephanie Uhlrig attack, TSH requested that David Mandt & Associates, an independent security consultant, develop a self-defense program to teach staff members how to fend off an aggressive attacker and specifically how to extricate from a patient's choke hold. Mandt & Associates developed such a program and previewed it to the State, but the program was not presented to TSH employees while Turnbull was employed.

Finally, in June 1996, when Turnbull's attacker, James Stout, transferred from the State's facility at Larned State Hospital (LSH), the State's LSH employees failed to note in the transfer papers that Stout had sexually assaulted two female employees at LSH. Prior to the time she was sexually assaulted and strangled on August 27, 1996, Turnbull did not know Stout had previously sexually assaulted at least two other female employees at LSH.

E. Sexual Assault of Turnbull

On August 27, 1996, James Stout, a TSH patient, viciously sexually assaulted Turnbull while she attempted to conduct a therapy session with him. Stout ripped Turnbull's clothes off in a public area, choked and bit her, groped her private body parts, inserted his fingers inside her, and told her to "give me some pussy" or he would kill her. He left Turnbull crawling naked on the TSH campus, trying to pull her undergarments up around herself. An ambulance transported Turnbull to an emergency room where she received treatment for the physical injuries she sustained. Following the attack, Turnbull was unable to work at TSH because she was too emotionally traumatized to return to the TSH campus.

At the time she was sexually assaulted, Turnbull was acting in conformance with all applicable TSH policies and procedures. Psychologists at TSH typically took patients for walks on the hospital grounds to conduct therapy sessions, and Stout was not, at that time, under any assault precautions or any other limited status that would have prohibited Turnbull from conducting the therapy session while walking on hospital grounds. Indeed, in the week before Stout attacked Turnbull, other TSH caregivers took him off campus to the zoo, a fishing trip, shopping, to the museum, and for a train ride. Following the sexual assault and subsequent investigation, the TSH Risk Management Committee concluded that, among other things, Turnbull was not at fault for the attack as she had met the appropriate standard of care.

Had TSH told Turnbull that Stout had previously sexually assaulted two other female care-givers at LSH, she would never have conducted therapy with him and, in fact, she would have sought his transfer to a more secure treatment facility. Had TSH provided private treatment rooms on the adolescent unit where Turnbull and other psychologists could conduct therapy while being observed for safety, she would have used them. Had TSH provided screechers, Turnbull would have been able to summon assistance, or frighten Stout, when he attacked her. Had TSH provided additional self defense training to TSH staff, particularly training on how to extricate from a choke hold, Turnbull would have been in a better position to defend herself from the sexual attack. Had TSH maintained the additional staffing necessary so Turnbull could have been accompanied by another staff member, the attack could have been avoided or greatly minimized.

F. The State's Actions After the Sexual Assault

Within weeks after the sexual assault, Dr. Kovach, TSH Director of Psychology, initiated conversations with Turnbull in which Dr. Kovach demeaned Turnbull, minimized the seriousness of the situation, and insinuated Turnbull's attractiveness was to blame for the sexual assault. Among other things, Dr. Kovach pressured and harassed Turnbull to return to work at TSH as soon as possible because "women in Bosnia were raped all the time and they got right on with business." Additionally, Dr. Kovach asked Turnbull what she expected and insinuated the sexual assault was caused by Turnbull's long hair, trim figure, and nice wardrobe.

Dr. Kovach's minimization of the life-threatening sexual assault caused Turnbull great additional emotional distress. Because of the sexual assault and Dr. Kovach's subsequent harassment, Turnbull's physician determined she was unable to return to work at TSH.

G. Proceedings at Trial

After proceeding through the EEOC administrative process, Turnbull filed a Complaint against TSH and the State of Kansas in the United States District Court for the District of Kansas, alleging Title VII hostile environment sexual harassment. The parties tried this case to a jury beginning February 1, 2000. The State did not object to the Court's ultimate verdict director.[3]

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3. The district court instructed the jury that in order to prevail on her hostile environment claim, Turnbull had to prove the following: (1) plaintiff was subjected to sexual comments, propositions, touchings, assault, or a risk of sexual assault while employed at

(Cont'd)

At the close of Turnbull's evidence, the State presented an oral motion for judgment as a matter of law. The district court did not invite argument from Turnbull, but instead immediately took the State's motion under advisement. At the close of all the evidence, the State renewed its oral motion for judgment as a matter of law, which the district court again took under advisement without inviting argument from Turnbull.

After seven days of evidence, the district court submitted the case to the jury for deliberation at approximately 11:30 a.m., on February 10, 2000. The jury deliberated until approximately 4:30 p.m., at which time they broke for the evening. The next morning, the jury deliberated for another two hours and then reported they were deadlocked. The jury found for Turnbull on the Verdict Form's first question,[4] but

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(Cont'd)

Topeka State Hospital; (2) such conduct was unwelcome; (3) such conduct was based on plaintiff's gender; (4) such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or offensive; (5) at the time such conduct occurred and as a result of such conduct, plaintiff believed her work environment to be hostile; (6) defendants knew or should have known of the sexual comments, propositions, touchings, assaults, or risk of sexual assault; and (7) defendants failed to take prompt and appropriate corrective action to prevent or remedy the unwelcome conduct or risk of unwelcome conduct.

4. Question #1 on the Verdict Form asked: "Do you find that Cynthia Turnbull was subjected to hostile work environment sexual harassment while employed by Topeka State Hospital and the State of Kansas?" The jury must have unanimously answered the first question "yes," because such a response was necessary for the jury to move to question #2, on which the jury was unable to reach consensus.

deadlocked 7-1 in favor of Turnbull on the second question.[5] At that point, without instructing the jury to continue deliberations and, again without hearing argument from Turnbull, the district court granted the State's oral motion for judgment as a matter of law that the district court had previously taken under advisement. (Pet. App., 13a)

H. The State Argued for a Negligence Standard on Appeal

Turnbull appealed to the Tenth Circuit and argued that the evidence presented at trial created a factual issue for the jury and precluded judgment as a matter of law. ***The State*** in turn argued for a ***negligence*** standard and asserted simply that Turnbull failed to present evidence to support her case. Indeed, the State specifically argued in its brief that a negligence standard must be applied:

> **IV.** ***A Negligence Theory must be Applied to Determine Whether Defendants may be Liable for Conduct of Non-Employees; here Adolescent Psychiatric Patients***
>
> In a case such as this one that presents a claim under Title VII for sexual harassment perpetrated by non-employees, the only basis for employer liability is a negligence theory. [citations omitted]. Thus, employers may be held liable in these

5. The Verdict Form's second question, on which the jury deadlocked 7-1 in favor of Turnbull, asked: "If you answered 'Yes' to question 1, do you find that Topeka State Hospital and/or the State of Kansas are liable for the hostile work environment sexual harassment Turnbull was subjected to under the standards set forth in the court's instructions?"

> circumstances if they fail to remedy or prevent a hostile or offensive work environment of which management level employees knew, or in the exercise of reasonable care, should have known. [ ]

V. *Plaintiff Failed to Present Evidence to Sustain her Burden of Proof for her Hostile Environment Claim*

A. Plaintiff's burden of proof

> To prevail on her sexual harassment theory, plaintiff must prove that: (1) she is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on her sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take appropriate remedial action. [citations omitted]

See State's Response to Opening Brief of Plaintiff/Appellant Turnbull, at 37-38. Thus, the State's proposed standard on appeal specifically ratified the district court's verdict director to which the State had not previously objected.

The Tenth Circuit held that Turnbull presented sufficient evidence she was subjected to a sexually hostile work environment and also that the State failed to take reasonable measures after having actual or constructive knowledge of the hostile sexual environment. (Pet. App., 6a-10a). The Court of Appeals reversed and remanded the case for a new trial. (Pet. App., 10a).

REASONS FOR DENYING THE WRIT

This Court should deny review. First, with regard to the proper Title VII liability standard, the State should be estopped from contesting a principle it specifically ratified and argued for on appeal. Moreover, the federal circuits universally approve a Title VII hostile environment standard in accord with the district court's verdict director at trial and, thus, there is no split of authority on the issue.

Second, with regard to the State's newly articulated Eleventh Amendment immunity attack, neither the lower courts in this case nor any other federal circuits have ever considered whether a Title VII hostile environment negligence standard infringes upon a State's sovereign immunity. Obviously then, the issue has not been explored by the lower courts, and this Court's review would be premature where no circuit split has yet emerged. Additionally, this case would be a poor vehicle for Supreme Court review of the issue, because any action by the Court would result in remand for a new trial and, in light of the evidence at trial, Turnbull would prevail even under the heightened deliberate indifference standard now touted by the State.

I. The Title VII Hostile Environment Sexual Harassment Liability Standard Is Not Appropriate for This Court's Review.

This Court should decline to review the Title VII hostile environment standard for at least two reasons. First, the State should be judicially estopped from attacking the very standard it argued for at the Tenth Circuit. Second, in the absence of any circuit split on the issue, the well-established Title VII negligence standard does not merit this Court's time and attention.

A. The State should be estopped because it argued for a negligence standard before the Tenth Circuit.

In response to Turnbull's Tenth Circuit appeal, the State specifically argued for and obtained a negligence standard in this hostile environment sexual harassment case. Pursuant to the doctrine of judicial estoppel, the State may not now be heard to complain because it lost under the very standard it advanced.

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808, 1814 (2001); *Pegram v. Herdrich*, 530 U.S. 211, 228, 120 S. Ct. 2143, 2154 (2000).

Not only did the State fail to object to the standard used by the district court in this case, it explicitly fought for that exact standard before the Tenth Circuit. The State wanted this case decided under Title VII negligence principles. The Tenth Circuit applied such a standard, and Turnbull prevailed because she submitted sufficient evidence at trial to support a claim of sexually hostile work environment. (Pet. App., 10a). The State lost under the principles it trumpeted, so now it wants to change the rules. It would be patently unfair — and fly in the face of the doctrine of judicial estoppel — to allow the State to sandbag Turnbull in this manner.

B. There is no circuit split and the lower courts universally articulate a negligence standard for Title VII hostile environment sexual harassment.

Even if the State is not judicially estopped, this Court should not review the Title VII hostile environment standard, because the federal circuits are in accord with the principles adopted by the Tenth Circuit. Where the acts of harassment stem from co-workers or third parties, the lower courts are in agreement that a Title VII negligence standard[6] applies in determining employer liability.[7]

The State did not cite, and Turnbull has not found, any reported lower court cases requiring deliberate indifference in a Title VII hostile environment sexual harassment case.

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6. The central elements of the Title VII hostile environment standard adopted by the federal circuits cited include: (1) that plaintiff was subjected to a sexually hostile environment; (2) that defendant knew or should have known of the harassment; and (3) that despite actual or constructive knowledge, the defendant failed to take adequate remedial action to end the harassment.

7. *See O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001); *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001); *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 298 (5th Cir. 2001); *Smith v. First Union Nat. Bank*, 202 F.3d 234, 241 (4th Cir. 2000); *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1078-79 (6th Cir. 1999); *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997); *Bonenberger v. Plymouth Township*, 132 F.3d 20, 25 (3d Cir. 1997); *Ridley v. District of Columbia*, 945 F. Supp. 333, 336 (D. D.C. 1996); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1042 (2d Cir. 1993); *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir. 1989).

In the absence of any circuit split on the issue, this Court should decline review of the clearly established Title VII hostile environment standard.

II. There is No Circuit Split Regarding Title VII's Abrogation of a State's Sovereign Immunity; the Issue is Undeveloped and Not Ripe for Review.

It is similarly well settled that in enacting Title VII, as well as its 1991 amendments, Congress abrogated the Eleventh Amendment immunity of the states.[8] Thus, no circuit split exists in that regard.

The State did not advance its novel argument — that a Title VII hostile environment case premised on anything other than a deliberate indifference standard infringes upon sovereign immunity — before the Tenth Circuit and, in fact, it has apparently never been specifically addressed by any lower court. At least implicitly, however, numerous courts have allowed Title VII hostile environment claims against a

8. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Laro v. New Hampshire*, 259 F.3d 1, 6 (1st Cir. 2001); *Holman v. State of Indiana*, 211 F.3d 399, 402 n.2 (7th Cir. 2000); *Johnson v. University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000); *In re Employment Discrimination Litig. Against the State of Alabama*, 198 F.3d 1305, 1316-17 (11th Cir. 1999); *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 448 (2d Cir. 1999); *Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998), *vacated in part on other grounds*, 165 F.3d 593, 594 (7th Cir. 1999); *Ussery v. Louisiana*, 150 F.3d 431, 434-35 (5th Cir. 1998); *Winbush v. Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995); *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554, 1561 (10th Cir. 1994); *Cerrato v. San Franciso Cmty. College Dist.*, 26 F.3d 968, 975-76 (9th Cir. 1994); *Greenwood v. Ross*, 778 F.2d 448, 452-53 (8th Cir. 1985); *Shawer v. Indiana Univ. of Penn.*, 602 F.2d 1161, 1163 (3d Cir. 1979).

state, federal, or municipal entity without requiring deliberate indifference.[9]

The State relies heavily on cases espousing a "deliberate indifference" standard in relation to wholly separate statutory schemes. For instance, the State cites *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999), a Title IX case allowing a hostile environment cause of action against a school board where the board took inadequate action to end student-on-student sexual harassment. The State focuses on *Davis* because the Court enunciated a standard whereby

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9. *See Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990) (employer negligence or recklessness in failing to respond to hostile work environment sexual harassment claims by employees may result in liability); *see also Longstreet v. Illinois Dep't of Corrections*, 276 F.3d 379, 381 (7th Cir. 2002) (holding that in cases involving sexual harassment by a coworker, an employer is liable for employment discrimination under Title VII only if it negligently failed to take steps to remedy the illegal harassment) (*citing Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999)); *Mikels v. City of Durham*, 183 F.3d 323, 329 (4th Cir. 1999) (Title VII liability will be imposed on employers if they are directly negligent in failing to act after receiving notice of alleged sexual harassment); *Davis v. United States Postal Service*, 142 F.3d 1334, 1342 (10th Cir. 1998) (employer can be held liable under Title VII if the employer was negligent or reckless in failing to respond to hostile work environment sexual harassment by employees); *Jeffries v. State of Kansas*, 147 F.3d 1220, 1229 (10th Cir. 1998) (under Title VII, an employer is negligent if it fails to remedy or prevent a sexually hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known); *Freeman v. Kansas*, 128 F. Supp. 2d 1311, 1322 (D. Kan. 2001) (an employer is not liable for racial harassment by a coworker under Title VII unless the employer was negligent) (*citing Hirschfeld*, 916 F.2d at 577).

liability attaches only when a school board shows "deliberate indifference" to ongoing harassment.

However, this Court's Title IX predecessor to *Davis* — and the case that established the deliberate indifference standard for Title IX harassment disputes — was *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 S. Ct. 1989 (1998). In determining that the heightened standard should apply to Title IX, *Gebser* expressly contemplated the differing purposes and characteristics of Title IX and Title VII. *Gebser*, 118 S. Ct. at 1997-2000. Because *Gebser* specifically distinguished Title IX from Title VII in formulating the deliberate indifference standard for Title IX harassment, the State's attempted reliance on *Davis* is misplaced. Indeed, the State seeks to turn *Gebser* and *Davis* on their ears and surmise that this Court should now adopt the Title IX standard for Title VII sexual harassment cases.

Turnbull respectfully suggests that, given the complexity of the Title VII sovereign immunity issue, the intricate factual scenario presented in this case, [10] and the fact that no lower court has ever expressly addressed the question, this Court should permit the matter to be debated by the lower courts and intervene only if and when a circuit split emerges.

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10. Practically, the negligence/deliberate indifference debate is a moot point. At trial, Turnbull presented voluminous evidence of the State's ***actual*** knowledge of a hostile sexual environment and that the State intentionally chose to do nothing despite Turnbull's and others' numerous complaints and suggestions for remedial measures.

CONCLUSION

The State seeks to avoid liability for its misconduct in taking no action despite known sexual harassment and sexual assault of its female employees. During trial and on appeal, the State invited and welcomed a negligence standard in this Title VII hostile environment sexual harassment case. The State previously argued Turnbull simply could not present sufficient evidence to support her case. The Tenth Circuit — after fully considering relevant Title VII precedent, the parties' briefs, and the evidence adduced at trial — adopted the State's negligence standard, found for Turnbull, and remanded the case for a new trial. Thereafter, the State reversed its position and now contends for the first time that a Title VII negligence standard violates its Eleventh Amendment sovereign immunity.

In the absence of any split among the federal circuits and because of the State's failure to raise the "negligence standard" and "sovereign immunity" issues in any manner below, this case is inappropriate for Supreme Court review. For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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